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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

HOWARD JOSEPH WHITEHILL,
Appellant,

v.

WILSON ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, AND THE BOARD OF REGENTS, UNIVERSITY OF MARYLAND,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLEES

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The Daily Record Co., Baltimore, Md. 21203

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLEES

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland and the special concurrence of Judge Sobeloff were rendered on September 8, 1966, and are reported at 258 F. Supp. 589. The opinions and the judgment and final order in this case are also set out in the Record at pp. 63-78.

JURISDICTION

This Court has jurisdiction to review the decision of the United States District Court for the District of Mary-

land by direct appeal pursuant to Title 28, U. S. Code, Section 1253.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REQUIREMENTS

1. Article 1, Section 10 and First and Fourteenth Amendments to the Constitution of the United States.

2. Article 85A, Annotated Code of Maryland (1957 Edition); Chapter 86, 1949 Laws of Maryland.

3. "Certification of Applicant for Public Employment", required of Appellant by University of Maryland.

QUESTIONS PRESENTED

1. Is the "Certification of Applicant for Public Employment" required of the Appellant by his prospective employer, the University of Maryland, unconstitutionally vague and uncertain in violation of due process of law?

2. Is the Maryland "Certification" an unconstitutional infringement on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution?

3. Does the requirement of the Maryland "Certification" violate due process of law for lack of procedural safeguards, for lack of a hearing on the issue of loyalty or by shifting the burden of proof of loyalty onto the applicant?

4. Does the required "Certification" constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution?

STATEMENT

This is a direct appeal from the final judgment and order entered on September 8, 1966 by the United States District Court for the District of Maryland, specially constituted

as a Three Judge Court, dismissing Appellant's complaint which sought to enjoin the Appellees from requiring the Appellant to execute a "Certification of Applicant for Publice Employment", as a condition precedent to employment by the Appellees. The Appellant, a university lecturer in creative writing, applied to the University of Maryland for a position as visiting lecturer in English during the academic year of 1966-67. During contract negotiations, Appellant made it clear that he would refuse to execute a so-called loyalty pledge required by the University entitled "Certification of Applicant for Public Employment". The University thereupon declined his appointment on the basis of his refusal to sign the certification as a condition precedent to his appointment.

The "Certification of Applicant for Public Employment" which the Appellant refused to sign reads as follows:

> "I, ...: do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 Edition)."

No oath or affirmation is required. The Maryland certification is not strictly a loyalty oath, does not call for an oath of allegiance and merely requires certification that the applicant is not engaged in an attempt to overthrow the Government. The present form of the oath was prescribed by the Attorney General of Maryland as being the maximum certification required by the Maryland Subversive Activities Act of 1949, Article 85A, Annotated Code of Maryland, 1957 Edition, in the light of recent

decisions of this Court. The latest revision of the Maryland loyalty pledge was officially prescribed by the Attorney General in a letter dated May 13, 1966 to Governor J. Millard Tawes, a copy of which letter is included in the Appendix to Appellant's Brief.

SUMMARY OF ARGUMENT

I.

The "Certification of Applicant for Public Employment" required of the Appellant by his prospective employer, the University of Maryland, is not unconstitutionally vague, uncertain and broad in violation of due process of law. The precise language of the Maryland oath has been held *not* to be vague and uncertain by this Court in *Gerende v. Board*, 341 U.S. 56, a *per curiam* opinion, without dissent, where the vagueness issue respecting a Maryland loyalty oath was before the Court.

Obiter dictum in the majority opinion in *Cramp v. Board*, 368 U.S. 278, indicated that this Court did not consider such language as vague, as distinguished from other language not "susceptible of objective measurement."

The Maryland loyalty certification does not contain any of the language condemned by this Court in prior decisions as vague and uncertain.

The Maryland certification is self-contained. Reference to overbroad definitions in the underlying statute requiring the certification, fatal to other oaths before this Court, is not a factor here.

The Maryland statute is severable, and only the required certification prescribed by the Attorney General of Maryland as meeting fully the statutory requirements, is before this Court.

II.

The Maryland "Certification" is not an unconstitutional infringement upon First and Fourteenth Amendment freedoms of expression, belief and association. This Court has distinguished the Maryland oath from others having such constitutional infirmities in previous cases. The Maryland certification applies only to acts; that is, engagement in an attempt to overthrow the government by force or violence. It constitutes no more infringement upon beliefs, expression and rights of association than the oath to support the Constitution required of all State and Federal legislative, executive and judicial officers by Article VI of the Constitution of the United States.

III.

The requirement of Maryland's "Certification" as a pre-condition to employment does not offend due process of law. An oath required as a condition precedent to employment by a State, where the oath is neither vague nor a penalty for certain beliefs and other protected First Amendment freedoms, does not violate due process of law for lack of procedural safeguards such as lack of a hearing or shifting of burden of proof onto the applicant. *Speiser v. Randall*, 357 U.S. 513; *Konigsberg v. State Bar of Calif.*, 366 U.S. 36.

IV.

The Maryland "Certification" does not constitute an unconstitutional "bill of attainder" under prior rulings of this Court. The certification is not intended to, and does not, inflict punishment upon a class of persons for past associations or other past conduct. The certification is a valid pre-condition of employment directly related to the fitness or capacity of the applicant for the position.

ARGUMENT

I.

THE "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT" REQUIRED OF THE APPELLANT BY HIS PROSPECTIVE EMPLOYER, THE UNIVERSITY OF MARYLAND, IS NOT UNCONSTITUTIONALLY VAGUE AND UNCERTAIN IN VIOLATION OF DUE PROCESS OF LAW.

The certification the Appellant was requested to sign merely contains a denial that the applicant is in any way engaged in an attempt to overthrow the government by force or violence. Nothing more is required. If loyalty oaths have any vitality whatsoever, it is difficult to conceive of one having more clear, concise and unambiguous language. Perhaps, the fact that the Appellant's specialty is creative writing leads him to distrust the ordinary meaning of words.

This Court, without dissent, declared the language of the Maryland oath to be free of constitutional infirmities in *Gerende v. Board*, 341 U.S. 56, 71 S. Ct. 565, 95 L. Ed. 745, reh. den. 341 U.S. 923, 71 S. Ct. 741, 95 L. Ed. 1356 (1951). The Court stated at pages 56 and 57, as follows:

> "We read this decision to hold that to obtain a place on the Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances, and with this understanding the judgment of the Maryland Court of Appeals is affirmed."

The Maryland decision to which the Court referred was *Shub v. Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), appeal dismissed, 340 U.S. 881. In that case the Maryland Court of Appeals declared that the purpose of the Ober Law was:

> ". . . to prevent infiltration in our State, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government by force or violence. We construe the affidavit required by Sec. 15 with respect to those desiring to become candidates for public office as a means of preventing such infiltration at its initial stage, thereby preventing confusion among the electors and that it is, in no sense, an additional oath of office."

All of the grounds for attacking the constitutionality of the present Maryland oath were before this court in the *Gerende* case (See Brief of Appellant, No. 577, October Term, 1950). This Court at that time had no difficulty in finding that there was neither vagueness nor uncertainty in an oath that an applicant "is not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence". *Gerende, supra.* The Court further indicated that such an oath would be acceptable to the Court with the understanding that the Attorney General of the State of Maryland "would advise the proper authorities to accept an affidavit in these terms *as satisfying in full the statutory requirement*". (Emphasis supplied.) *Ibid.* The Appellant in the case at bar refused to sign such a certification prescribed by the Attorney General to State agencies as meeting State and constitutional requirements (See letter from Attorney General to Governor, May 13, 1966, in Appendix to Appellant's Brief, p. 17a).

The Constitution has not been amended since 1951 with respect to any Article or Section at issue here. It is opinions of the Supreme Court, *seriatim* that we are expounding.

From 1951 through June, 1966, this Court consistently held that the State may condition public employment upon its employee's abstaining from knowing membership in the Communist Party and other organizations advocating the overthrow of the government by force or violence; that the State may inquire into such membership; that the State may condition public employment upon refusal to answer inquiries about such affiliations; and lastly that a State may condition employment upon the employee's refraining from actual engagement and participation in an attempt to overthrow the government by force or violence. *Gerende, supra; Adler v. Board,* 342 U.S. 485; *Beilan v. Board,* 357 U.S. 399; *Lerner v. Casey,* 357 U.S. 468; *Nelson v. Los Angeles County,* 362 U.S. 1; *Wieman v. Updegraff,* 344 U.S. 183; *Garner v. Board,* 341 U.S. 716; *Slochower v. Board,* 350 U.S. 551. In 1966, *Elfbrandt v. Russell,* 384 U.S. 11, added the additional qualification that knowing membership in the Communist Party or other such organization is not grounds for refusal of public employment or dismissal absent a showing of specific intent to further the illegal aims of the organization.

No case has held that the State may not condition public employment upon the employee's refraining from actual engagement and participation in an attempt to overthrow the government by force and violence.

Constitutional protection extends only to the applicant whose exclusion from public employment is arbitrary, discriminatory and unreasonable. *Wieman v. Updegraff, supra;*

Slochower, supra; Torcaso v. Watkins, 367 U.S. 488; *Baggett v. Bullitt,* 377 U.S. 360; *Cramp v. Board,* 368 U.S. 278; *Shelton v. Tucker,* 364 U.S. 479; *Keyishian v. Board,* 385 U.S. 589. In *Weiman v. Updegraff, supra,* this Court stated as follows:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. 183, 192.

The Maryland certification meets the test previously laid down by this Court on the vagueness question; namely, whether or not the oath was lacking in "term susceptible of objective measurement". *Cramp v. Board, supra,* 368 U.S. 278, 286; *Baggett v. Bullitt, supra,* 377 U.S. 360, 367. In *Cramp,* Mr. Justice Stewart remarked:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government . . . The provision is completely lacking *in these or any other terms susceptible of objective measurement.*" (Emphasis supplied.) 368 U.S. 278, 286.

Further support for the clarity of the oath may be found in *Yates v. U. S.,* 354 U.S. 298, where the Court in reversing convictions under the Smith Act, 18 U.S.C. 2385, Section 2, stated exactly what the terms thereof do and do not proscribe:

> "The Smith Act reaches only advocacy of action for the overthrow of government by force and violence" 344 U.S. 298, 324. See also *Baggett, supra,* 377 U.S. 360, 370, n. 8; and *Dennis v. U. S.,* 341 U.S. 494 (upholding Section 2 of the Smith Act over a vagueness challenge):

Certainly if "advocacy of action for the overthrow of government by force and violence" is understood by this Supreme Court and has been determined to be free of vagueness and uncertainty when applied in concrete situations, the language of the Maryland oath presented to the Appellant, must likewise pass muster.

However, Appellant, a creative writing specialist, insists that resort must be had to "legislative gloss" to understand the true meaning of the oath and all of its nefarious implications. This resort to legislative gloss is self-induced confusion designed to rationalize an intended result; namely, violation of due process of law. The Maryland oath was carefully drafted by the Attorney General to avoid the very pitfalls of interpretation from which the Appellant seeks to benefit here.

Compare for example the Washington oath as proscribed in *Baggett, supra,* at page 364, 5. The oath calls for a sworn statement that the oath taken is not a "subversive person" as defined in the Washington Subversive Activities Act. There are no qualifying words. The definition of "subversive person" in the Washington Act is identical to that in Maryland's Ober Law except for the last clause relating to membership in subversive organizations. But the Maryland oath does not require the Applicant to certify that he is "not a subversive person as defined in the Act." This basic distinction was recognized by the Court in *Baggett* in note 7, page 368.[1]

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[1] "7. The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565, is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms

The vices of vagueness condemned in *Keyishian, supra,* do not exist here. Those vices consisted of "a regulatory maze". "Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross references to interrelated enactments and rules." 385 U.S. 589, 604,

First there was the Feinberg certificate issued pursuant to rules and regulations of the Board of Regents. Then the Feinberg certificate was rescinded; and in lieu thereof, the applicant was required to be informed that Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law constituted part of this contract. Subversive organizations were listed. The statutes referred to "treasonable or seditious" utterances or acts. The Civil Service Law referred to definitions in the Penal Law, such as "criminal anarchy" and "advocacy of criminal anarchy". Section 105 (1)(a) bars employment of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. Section 105 (1)(b) proscribes distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow of government. The Court further remarked that it did not have the benefit of "judicial gloss" to enlighten it as to the scope of this complicated plan. At page 601. (Cf. *Gerende, supra.*)

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challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged 'in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." Id. at 56-57, 95 L. ed. at 746. (Emphasis in original.)

Condemning the "very intricacy of the plan and the uncertainly as to the scope of its proscriptions", this Court described the New York loyalty program as "a highly efficient *in terrorem* mechanism." *Ibid.*

The fact that the Attorney General of Maryland following the mandate of this Court in *Gerende*, has advised the proper authorities to accept an affidavit in a more restricted form than originally contemplated by the Ober Law, *as satisfying in full the statutory requirement*, should dispense with the necessity of reviewing the constitutionality of the Ober Law in its original form. This Court sits to decide cases, not manipulate abstractions. Appellant, nevertheless, urges review of the "underlying statutory provisions" in pristine form because he challenges the right of the University of Maryland to require the certification in the restricted form as satisfying the statute and also he challenges the fact that the severability clause of the Act was ever made operative so as to permit statutory requirements less than the maximum under the Act. These challenges should rightfully be answered by the Maryland Court of Appeals. Nevertheless that Court has consistently upheld statutes as constitutional, if any construction thereof will sustain the validity of the legislative act. *Stevens v. City of Salisbury*, 240 Md. 556, 214 A. 2d 775 (1965); *Kirkwood v. Provident Savings Bank*, 205 Md. 48, 106 A. 2d 103 (1954).

A construction which eliminates words or phrases offending the Constitution of the United States will be favored, where severability is permitted by the law and the statute is not so emasculated that the legislative purpose cannot be carried out.

Both the Maryland Attorney General and the Supreme Court in 1951 understood the Maryland Court of Appeals to have restricted the term "subversive person", as defined

in the Ober Law, to mean a person who is "engaged in one way or another in the attempt to overthrow the government by force and violence", and knowingly a member of an organization engaged in such an attempt. Thus restricted, the Act had sufficient vitality to support the restricted form of affidavit.

Under Section 11 of the Ober Law, the Applicant is required to sign a written statement, under penalties of perjury, containing answers to material inquiries by the agency of the State of Maryland to enable the agency to determine whether or not the applicant is a subversive person. Since the Attorney General is legal adviser to State agencies, the certification required by the agency was prescribed by the Attorney General in the light of constitutional interpretations of the Supreme Court. The Attorney General could do this because the Act is severable in its provisions.

Appellant further challenges the severability of Article 85A in spite of Section 18, which reads as follows:

> "If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable."

His argument is that severability clauses are of no avail when "the valid and invalid portions of a statute are so inextricably intertwined, connected and inter-dependent in subject matter and purpose as to preclude the presumption that the legislature would have passed one portion without the others" (Appellant's Brief, page 42). The Court below rightly rejected this contention as applied to

the case at bar. The Maryland Law applicable to severability clauses in general is as follows:

> "In the absence of a severability clause, a presumption is raised that the legislature intends the act to be effective as an entirety. If there be a saving clause, an opposite presumption of separability is raised, 11 *Amer. Jur., Constitutional Law,* sec. 156, p. 847, 2 Sutherland, *Statutory Construction,* sec. 2409; but the saving clause is not absolute or an inexorable command, for it is merely an aid to interpretation. It must be afforded a reasonable interpretation, but does not operate to save provisions which clearly would not have been enacted into law except upon the assumption that the entire act was valid. The true test of separability is the effectiveness of an act to carry out, without its invalid portions, the original legislative intent in enacting it; and a saving clause will not be given effect where such invalid provisions affect the dominant aim of the whole statute."

See also *Police Comm. v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727, cert. den. 364 U.S. 909; *Cromwell v. Jackson,* 188 Md. 8, 52 A. 2d 79; *Heubeck v. City of Baltimore,* 205 Md. 203, 107 A. 2d 99.

The oath as modified by *Gerende* and subsequently by the Attorney General quite precisely promote the stated purpose of the Ober Law as expressed in the title, Chapter 86, 1949 Laws of Maryland.

> "An Act to add a new Article . . . making it a crime to commit acts or advocate acts intended to effect the overthrow of the Government of the United States or the State of Maryland or of any political subdivision thereof by violence or other unlawful means, or to attempt or conspire so to do, relating to subversive organizations generally, to the loyalty of candidates for public office and of officers and employees of the State or of any political subdivision thereof . . .".

More important than the title to the Act is the construction placed upon the Act by the Maryland Court of Appeals. Rejecting the contention of the appellant in *Shub* that the addition of the word "revolution" to the words "force or violence" prohibits anyone from advocating or teaching the alteration of the form of government by a *peaceful* revolution, the Maryland Court admonished the appellants that the words of the statute must be construed together and in the light of the title which uses the words "violence or other unlawful means". 196 Md. 177, 190, 191. Rejecting the contention that Section 15 was overbroad, the Court said:

> "It is easy to be meticulous when you are attempting to dissect a statute and are trying to evade its provisions, but the proper rules of statutory construction require that all of its provision be interpreted in accordance with the intent and meaning of the entire enactment. . . . The purpose of Section 11 of Article 15 of the Constitution, and of Chapter 86 of the Acts of 1949, is the same and they are construed together to effect that purpose. That is to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence*. . . ." 196 Md. 177, 191, 192.

The foregoing should dispel any doubt on the part of this Court that the Maryland Court of Appeals would find the oath presented to Appellant to be repugnant to the intent of the Act, when the oath is practically word for word what the Court of Appeals said the Act meant.

As stated by the Deputy Attorney General, Robert C. Murphy, at the argument before the District Court below, there have been but two forms of oath prescribed by the Attorney General for use by State agencies since *Gerende*

was decided in 1951 (R. 35). The oath used from 1951 until May, 1966 (when Elfbrandt was decided) read as follows:

> "I ..... do hereby certify that I am not a subversive person as defined by law; namely, that I am not a person who is engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence, and I am not knowingly a member of an organization engaged in such an attempt."

There is no factual basis in the record before this Court supporting Appellant's statement in his Brief at page 15 that "until recently the Court's understanding in *Gerende* was not even closely followed by the long succession of Maryland Attorneys General." The fact is that the certification quoted above as having been prescribed between 1951 and 1966 does, in fact, limit the legal definition of "subversive person" in the precise manner prescribed in *Gerende*. The only reasonably construction is that "subversive person as defined by law" means and is limited to that which follows "namely" in the oath. This was the limitation placed upon the oath by judicial construction.

Nevertheless, in 1966 a change was dictated by Elfbrandt with respect to "knowing membership" in organizations engaged in overthrowing the government. The fact that the oath was further limited in 1966 by the Attorney General rather than by the courts does not give the Appellant the right to choose the language of the oath he wishes to challenge before this Court. Judge Winter dispensed with this argument in the Court below, as follows:

> "This argument overlooks Section 18 of Article 85A, as clear an expression of severability as could be found. Moreover, as the chief legal officer of the State of Maryland, sworn to uphold the Constitution of the United States as well as the Constitution and

laws of the State of Maryland, Maryland Constitution, Article I, Section 6, the Attorney General acted properly within the scope of his authority in advising that those portions of the oath prescribed by Article 85A repugnant to decided cases of the Supreme Court of the United States should not be required of state employees, even in the absence of specific court decree" (R. 74).

Judge Winter might also have added that the Attorney General under his constitutional powers cited above, might properly advise the State Agency (University of Maryland) concerning the constitutionality and legal sufficiency of any written statement (under penalty of perjury) the agency may require an applicant to execute pursuant to Section 11 of the Ober Law (Code, Article 85A).

Appellant also argued that the oath sought to be exacted from him is not limited to its own test but, rather, extends to the full oath purportedly required by Article 85A. The Court below dispensed with this contention as follows:

> "The first portion of the argument rests upon the assertion that, in the certificate plaintiff was asked to execute, the reference to 'Art. 85A, paragraph 13, Annotated Code of Maryland, 1957' after the phrase 'Required by law' means that the certification following, which, on its face, is limited to engaging in one way or another in the attempt to overthrow the government by force or violence, embodies aspects of the oath prescribed by statute which are clearly invalid under the Supreme Court decisions. We are not persuaded" (R. 73).

Quite obviously paragraph 13 has no relevancy whatsoever to Appellant's situation as an applicant, since he was not an employee in 1949. The authority for requiring Appellant to execute the certification is found in Section 11. Apparently in reprinting the oath prescribed by the

Attorney General in May, 1966, the University retained the heading from the original Ober oath exacted of persons in State service when the Ober Act was passed.

Finally, the Appellee contends that the Maryland certification is no more vague — and perhaps is far clearer — than the oath of office that Article VI of the United States Constitution requires to be taken by all legislative, judicial and executive officers, *both of the United States and of the several States;* namely, "to support this Constitution." (Emphasis supplied.) It is submitted that all of the self-interrogation of this Court leading to its conclusion that somewhere, someone might misunderstand the Washington or Arizona oaths in *Baggett* and *Elfbrandt, supra,* could be directed likewise to anyone taking the oath to support the constitution. Can a member of the Communist Party take such an oath in good faith? This Court should construe the simplified Maryland oath with the Constitutional oath in mind; for the constitutional test of what is and what is not vague and indefinite is far from clear at this juncture. See Amsterdam, *The Void for Vagueness Doctrine,* 109 U. Pa. L. Rev. 67 (1960).

II.

THE MARYLAND "CERTIFICATION" IS NOT AN UNCONSTITUTIONAL INFRINGEMENT ON FREEDOM OF EXPRESSION, BELIEF, ASSOCIATION, AND ACADEMIC FREEDOM IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Maryland "Certification of Applicant for Public Employment" does not reach beliefs or constitutionally protected expression and association. The certification is directed to specific acts of a person engaged in the overthrow of his government by force or violence.

If a person were to put down on paper, in the course of an actual plot to assassinate the Governor, detailed instruc-

tions to other members of such a conspiracy regarding the means of entry and destruction by explosives of the Governor's mansion, clearly neither the written instructions nor the association of such person in the conspiracy would be constitutionally protected.

It is, of course, well settled that the constitutional right of liberty of speech is subject to reasonable regulations as are necessary to promote and preserve the public welfare and safety. It is equally well settled that the State may require, as a condition of employment with it, that individuals seeking such employment execute a valid loyalty certification, such requirement being a reasonable regulation to protect the State service, to establish an employment qualification of loyalty to the State, and to the United States. *Garner v. Board of Public Works, supra; Gerende v. Board of Supervisors of Elections, supra; American Communications Association v. Douds,* 339 U.S. 382. More specifically, as stated in Garner, at page 720:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness, past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. . . ."

See also *United Public Workers v. Mitchell,* 330 U.S. 75, upholding the constitutionality of the congressional enactment restricting political activity of Federal Civil Service employees.

The right of the State to require a proper certification of loyalty has been expressly upheld even in those cases where particular oaths have been declared unconstitution-

ally vague. See *Baggett v. Bullitt, supra,* at page 379, wherein it is noted:

> "As in *Cramp v. Board of Public Instruction, supra,* we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

As even more succinctly stated by Mr. Justice Frankfurter in *Garner,* in his separate concurring opinion, at page 725:

> ". . . No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence. . . ."

Appellant, as an applicant for public employment in Maryland, declined to subscribe to the statement that "I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence."

Having determined that this certification is not unconstitutionally vague, it can hardly be denied that it constitutes a valid standard of qualification and eligibility for public employment by seeking, as it does, to prevent employment of persons engaged in an attempt to overthrow the government by force or violence.

The case of *Speiser v. Randall,* 357 U.S. 513 manifests the significance of this different purpose. There, a loyalty oath was required as a condition for eligibility for a veteran's tax exemption. The Supreme Court struck down this provision on the ground that its enforcement would place the burden of proof of nonadvocacy of violent overthrow on the taxpayer and as such would violate due process. The Court was careful, however, to delineate the differences between the *Speiser* situation, where the oath was used to penalize people for holding certain ideas, and

situations where, as here, a loyalty certification is required only as a condition for public employment. Referring to the *Garner*, *Gerende*, and *Douds* cases, *supra*, the Court said:

> "In these cases however there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. . . . The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be used to the detriment of the public." 357 U.S. at 527.

Actually the first three arguments herein are essentially interrelated because if the language of the oath is not vague and uncertain or if the oath is not so broad that it reaches protected speech and other forms of expression, then the due process requirements become significant (See the thread of argument in *Keyishian*, where while essentially discussing vagueness, the Court touches base on the second and third arguments herein).

Consequently, in further rebuttal of Appellant's first three contentions, the language of the oath should be examined to see the extent that free speech, in particular, may or may not be inhibited by it.

Since "overthrow of the government by force or violence" has never given this Court any difficulty in interpretation, the terms "engaged in" and "attempt" will be examined, as well as the phrase "in one way or another".

With respect to the latter phrase, during arguments, Mr. Murphy indicated that about the best definition he could think of was "in any way" (R. 41). This is entirely reasonable. The spectacle of the Attorney General wriggling on a pin while explaining the meaning of "in one way or

another" is no less exciting (See Appellant's Brief, p. 38) than having any member of this Court explain "deliberate speed" or "invidious discrimination" and other such precisely measurable expressions emanating from this Court, which expression are supposed to guide state officials in the exact science of government. Since there is no ready-made formula for overthrowing governments, it is not vagueness, but rather good sense, to recognize that one person's contribution to such a cause may differ from that of another, or may vary from time to time.

Under Maryland Law applicable to crimes, an "attempt" consists of an intent to commit the crime, the intentional doing of some act, beyond mere preparation, towards its commission, but short of its full consummation. *Franczkowski v. State,* 239 Md. 126, 210 A. 2d 504, 6 A.L.R. 3d 238 (1965); *Wiley v. State,* 237 Md. 560, 207 A. 2d 478 (1965).

Accordingly to Black's Law Dictionary and 30 C.J.S. 700, the word "engage" or "engaged" generally refers to a continuous occupation or participation in some type of activity, more than occasional participation or single act.

Taking "engaged" and "attempt" together in their commonly understood meanings, the term "engaged in an attempt" would seem to preclude mere speech or advocacy and quite definitely would mean some form of action intended by the actor to achieve a certain objective. In the case at bar, the action would be directed at violent overthrow of the government. The very fact of the post-Elfbrandt revision of the Maryland oath would further support the conclusion that the oath refers to actions and not mere words of advocacy, expression, teaching, and so forth.

III.

THE REQUIREMENT OF THE MARYLAND "CERTIFICATION" DOES NOT VIOLATE DUE PROCESS OF LAW FOR LACK OF PROCEDURAL SAFEGUARDS, FOR LACK OF A HEARING ON THE ISSUE OF LOYALTY OR BY SHIFTING THE BURDEN OF PROOF OF LOYALTY ONTO THE APPLICANT.

In *Keyishian*, this Court approved of the statement of the Court of Appeals for the Fourth Circuit that ". . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." 385 U.S. 589, 605, 606. Inherent in that statement is the proposition that public employment may be subjected to reasonable conditions. If the Maryland certification is neither vague and indefinite, nor unduly inhibitory of free expression protected by the First Amendment, then the oath must be a reasonable condition of public employment; for relating as it necessarily does to the fitness of the applicant as in the case of inquiries relating to disease, vices, crime record, and so forth, the certification amounts to legitimate inquiry. See *Konigsberg v. State Bar*, 366 U.S. 36.

Is an applicant for a position of teller in a national bank entitled to a hearing in which the employer must prove he is dishonest just as if he were a civil servant being discharged for embezzlement, or may his employer require him to certify prior to his employment certain facts relevant to his honesty as a condition of his employment? To hold that an applicant's "right" to be employed by a State is such that he is insulated from reasonably direct inquiries (subject to penalties for perjury) relating to his fitness as a future employee, and that the State has the burden of proving, without such inquiry, at a hearing, that such employee is unfit, is illogical. This Court has not gone that far. If this Court should so rule, every State would be-

come more like a police state because, not being able to ascertain what it seeks from the applicant, whether it be loyalty, health, honesty or vices, it must rely on the testimony of others and maintain a large investigatory apparatus to ascertain initial facts and leads. What is this Court's concept of a State and its proper role as employer?

Suppose a state judicial appointee refuses to make oath that he will support the Constitution of the United States as required by Article VI of the Constitution. Is the State required to permit the judge to commence his duties until the State "proves" at an evidentiary hearing that the judge will *not* support the Constitution?

Garner, supra, is still authority for the very reasonable proposition that a governmental employer may inquire of its employees as to matters that may prove relevant to their fitness and suitability for the public service (341 U.S. 716, 720), and loyalty to the State is relevant (341 U.S. 716, 721). In his concerning opinion in *Garner,* Mr. Justice Frankfurter said:

> "No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowing members of an organization engaged in such endeavor. See *Gerende v. Board . . .*"

Appellant relies heavily on *Speiser v. Randall, supra,* for his third argument. Speiser held unconstitutional a state procedural rule that in order to obtain an exemption a taxpayer must bear the burden of establishing that he did not advocate the violent overthrow of government. *Speiser* was distinguished in *Konigsberg v. State Bar, supra,* 366 U.S. 36, 54, where there was no attempt to penalize political beliefs or control speech, but rather to protect, from an evil shown to be grave, some interest clearly with-

in the sphere of governmental concern. In *Speiser* there was no overriding interest of the State to be protected, such as prevention of infiltration of persons attempting to overthrow the government by force or violence.

Likewise, the Court made manifest the distinctions on the burden of proof issue:

> "In the earlier cases . . . the loyalty oath once signed became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the office holder the burden of proving his right to retain his position. The signer, of course, could be prosecuted for perjury, but only in accordance with the strict procedural safeguards surrounding such criminal prosecutions. In the present case, however, it is clear that the declaration may be accepted on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof." 357 U.S. 513, 528.

In *Konigsberg v. State Bar of California, supra,* the Court was careful to demonstrate that the *Speiser* principle was limited to where there was intent to penalize certain beliefs and to effectuate such attempt by placing the burden of proof of nonadvocacy of violent overthrow on the Plaintiff, There, the Court upheld California's right to deny admission to the practice of law to an individual who refused to answer the bar examining committee's questions pertaining to membership in the communist party. The Court said at page 54:

> "*Speiser* was explicitly limited so as not to reach cases where, as here, there is no showing of an attempt to penalize political beliefs."

The Court also found that the burden of proof had not been shifted to petitioner merely because he was required to

testify before the committee and to submit to discovery in order to become a member of the bar. 366 U.S. at 55.

Furthermore, the Maryland certification is no more constitutionally offensive than a requirement common to many job applications that the applicant state whether or not he has a venereal disease or a mental or nervous disorder, or is a narcotics user or indulges in consumption of alcoholic beverages beyond a certain amount.

IV.

THE REQUIRED "CERTIFICATION" DOES NOT CONSTITUTE A BILL OF ATTAINDER IN VIOLATION OF ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

Appellant's argument that the required Certification of Applicant for Public Employment "constitutes an unconstitutional bill of attainder has consistently been rejected by this Court where that argument in similar cases has received consideration. *Gerende, supra; Garner, supra; Konigsberg v. State Bar, supra; Wieman v. Updegraff, supra.*

"A bill of attainder is a legislative act which inflicts punishment on an individual without a judicial trial". *U. S. v. Lovett,* 328 U.S. 303, 315, quoting from *Cummings v. Missouri,* 71 U.S. (4 Wall) 277, 323. The bill of attainder cases make it clear that incidental hardship caused by a valid regulatory scheme does not amount to "punishment"; whereas if the dominant purpose of the statute is to "inflict punishment", then it is a bill of attainder.

In *Garner* the Court stated that punishment is not imposed by a "general regulation which merely provides standards of qualification and eligibility for employment". 341 U.S. 716, 722. In *Cummings v. Missouri, supra,* the Court distinguished between a qualification or pre-condi-

tion for employment relating to the fitness or capacity of a person for the position and a pre-condition strictly in the nature of punishment for past actions not punishable at the time committed. In *Ex parte Garland*, 71 U.S. (4 Wall) 333, this Court stated:

> "The Legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the inflication of punishment, against the prohibition of the Constitution."

In *Lovett, supra*, the Congress refused to permit appropriated funds to be used for the payment of salaries of three named individuals after a particular date. This action was prompted by revelation of the Dies Committee that these persons, were by reason of their past associations and statements, considered by Congress to be subversive. The act was held to be both a bill of attainder and *ex post facto* in that it permitted the legislature to inflict penalties for past actions upon these individuals without judicial trial.

In the light of the cases cited hereinabove the "Certification" is not an unconstitutional bill of attainder. The Maryland certification relates to present acts, not past conduct; and, is intended to protect the State against infiltration persons engaged in violent overthrow of governmental authority, rather than to inflict punishment for past associations.

CONCLUSION

Under the interpretation placed upon recent rulings of this Court by the Appellant, Maryland must hire any applicant who is a known Communist party member, Nazi, Black Power fanatic or member of any organization that advocates destruction of our constitutional government by violent means such as murder, arson, assassination, etc., to teach our children in our public schools, or for any other job if otherwise qualified; and the State may not discharge such persons until it can prove in an adversary proceeding that such persons have a "specific intent" to overthrow the government by force and violence. Apparently the financial status of any such group (not receiving sufficient funds from abroad) is clearly assured if all of its members have a constitutional right to continued employment in any State in the Union until discharge proceedings producing the requisite evidence have withstood years of court appeals. The burden thus placed upon the State governments in sheltering and providing means of livelihood for the violent revolutionists in this nation is intolerable. Maryland is particularly concerned with its new role in this regard because of its proximity to the nation's capital.

Lacking a slick investigative organization such as the Federal Bureau of Investigation, Maryland has chosen to ascertain the loyalty of its employees and officers by means of the simple certification of non-engagement in an attempt to overthrow the government by force or violence. The *wisdom* of this method is not open to inquiry by the Federal judiciary. The wisdom of such legislation is solely for determination by the elected representative of the people of this State assembled in the State Legislature. The only questions before this Court involve the constitu-

tional limitations upon Maryland's use of the "Certification of Applicant for Public Employment" as a means of determining loyalty.

Based upon prior judicial construction of the operative words of the Maryland certification, and for the reasons set forth in the foregoing arguments, it is respectfully submitted that the Maryland certification required of the Appellant herein is free of the constitutional defects that have plagued loyalty oath procedures in other States. The judgment of the Court of Appeals for the Fourth Circuit, therefore, should be affirmed.

Respectfully submitted,

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